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IN THE SUPREME COURT OF THE STATE OF MONTANA
Case No. DA 19-0484

CLARK FORK COALITION, ROCK CREEK ALLIANCE, EARTHWORKS, and MONTANA ENVIRONMENTAL INFORMATION CENTER,

Petitioners/Appellees,

v.

MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION and RC RESOURCES, INC.,

Respondents/Appellants.

APPELLANT MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION'S REPLY BRIEF

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The Appellant, Montana Department of Natural Resources and Conservation ("DNRC") hereby submits its Reply Brief.

ARGUMENT

The Legislature, pursuant to the Montana Water Use Act ("MWUA"), charged the DNRC with administering the law for water right permitting and protecting senior water rights. §§85-2-112, -113, MCA. Administration of the Water Quality Act ("WQA"), including water classification and nondegradation, is the responsibility of the Department of Environmental Quality ("DEQ") and the Board of Environmental Review ("BER"). The WQA protects Outstanding Resource Waters ("ORW") and high-quality waters from degradation. *Infra* II. The MWUA does not provide those protections. The fact that Appellees' argument is largely premised on their interpretation of the WQA rather than the applicable MWUA provisions, illustrates this critical point.

The Appellees concede that DNRC's longstanding interpretation of the water right permitting criteria only evaluates water rights as "legal demands." However, they maintain this interpretation is not entitled to deference because DNRC never formally, explicitly, or squarely addressed whether "legal demands" encompass ORW protections. *Appellees' Response Brief* ("*Appellees' Br.*") 37-38; *Order on PJR* 10.

Judicial deference principles balance the constitutional concept of the legislative direction charging DNRC to administer the MWUA, with judicial authority to review DNRC's administrative decisions for compliance with the laws it is tasked with implementing. *MEIC v. DEQ*, 2019 MT 213, ¶20, 397 Mont. 161, 451 P.3d 493. As the agency tasked with administering the MWUA, DNRC's interpretation of §85-2-311, MCA, is entitled to deference. *Upper Missouri Waterkeeper v. DEQ*, 2019 MT 81, ¶13, 395 Mont. 263, 438 P.3d 792. Moreover, judicial deference is required when the agency's interpretation is reasonable and best effectuates the legislature's intent; when the legislature acquiesces and takes no action to inform the agency interpretation; and, when the agency interpretation has stood unchallenged for a considerable length of time, creating public reliance upon the interpretation. *Baitis v. DOR*, 2004 MT 17, ¶¶22-24, 319 Mont. 292, 83 P.3d 1278; *Lohmeier v. DNRC*, 2008 MT 307, ¶¶27-28, 346 Mont. 23, 192 P.3d 1137.

DNRC's longstanding interpretation that "legal demands" under the legal availability criterion are limited to water rights is consistent with the plain language of the MWUA, has been relied upon by the public, and was confirmed as consistent with legislative intent through enactment of SB97(1997). Furthermore, the meaning assigned by DNRC to "legal demands" is reasonable and best effectuates the primary purpose of the MWUA and §85-2-311, MCA.

That purpose is to permit new uses while protecting senior water rights from encroachment. Accordingly, DNRC's interpretation is entitled to considerable deference and must be affirmed. *Lohmeier*, ¶¶27-28; *Baitis*, ¶¶22-24.

Appellees' contortion of the plain language and legislative history of the MWUA to support their interpretation of "legal demands" falls apart under the slightest scrutiny. Moreover, their arguments ignore the judicial deference owed to DNRC. *Appellees' Br.* 37-40. The fact that Appellees are the first to challenge DNRC's interpretation of "legal demands" in over twenty-years reflects public's reliance upon, and the deference owed, DNRC's interpretation.

In this case, DNRC correctly concluded that an applicant is not required to address whether potential degradation is "substantially in accordance with" a water classification unless a valid objection is filed by a qualified entity. §§85-2-311(1)(g) and -311(2), MCA. This interpretation is consistent with the plain language of §85-2-311(2), MCA, comports with legislative intent, and is supported by the structure of the MWUA and WQA.

Appellees' attempt to frame DNRC's application of §85-2-311(2), MCA, as a violation of the Constitutional right to a clean and healthful environment also fails because DNRC lacks the authority to permit or prevent degradation of high-quality and ORW classified waters. DEQ and BER are responsible for administering the nondegradation and ORW protections of the WQA. *Infra* II.

Appellees' speculation regarding §75-5-317(2)(s), MCA, may not bar DEQ from the opportunity to determine whether RC Resources' activities are nonsignificant or subject to degradation review.

The plain language of §85-2-311(1)(a), MCA, and the MWUA does not task the DNRC with implementation of the WQA, and it does not foreclose DEQ's authority and discretion over RC Resources' regulated activity. Suggesting otherwise constitutes a massive re-write of the law that this Court must reject.

I. DNRC'S INTERPRETATION THAT "LEGAL DEMANDS" ARE LIMITED TO WATER RIGHTS IS CORRECT

A. DNRC's interpretation of "legal demands" is consistent with the Legislature's intent.

Contrary to Appellees' contentions, the SB97 amendments *drafted by DNRC* and adopted by the Legislature were designed to codify DNRC's legal availability analysis as law. *Appellees' Br.* 31-37.

Appellees' interpretation of "legal demands" should be rejected because it conflicts with the MWUA and specific provisions of §§85-2-311(1)(g) and -311(2), MCA. *Appellant DNRC's Opening Brief* ("*DNRC Br.*") 18-26; *Infra.* I(D)-(E). Nonetheless, a deeper dive into the legislative history of SB97 is appropriate considering this Court's previous concern that "legally available" and "legal demands" were not statutorily defined. *CSKT v. Clinch*, 1999 MT 342, ¶15,

297 Mont. 448, 992 P.2d 244; *Grenz v DNRC*, 2011 MT 17, ¶28, 359 Mont. 154, 248 P.3d 785.

All versions of SB97 endorse and adopt the process used by DNRC as set forth in the "Information and Instructions for Application for Beneficial Water Use Permit, Form 600 and Criteria Addendum A" ("*DNRC Pamphlet*"). *SB97 Hearing, H. Nat. Resources*, 55th Leg., Ex. 9[1], Sponsor Sen. Grosfield Audio 1 of 3 @52:40-59:17 and Audio 3 of 3 @ 00:30-2:50, and Don McIntyre Test. Audio 1of 3 @1:10:43–1:13:48 and Audio 2 of 3 @ 21:47-24:12[2] (March 5, 1997). In response to concerns that the reference to the *DNRC Pamphlet* in the statement of intent for SB0097.02 was insufficient to codify that practice, DNRC's proposed amendment, adopted by the Legislature, deleted the reference from the statement of intent and codified the *DNRC Pamphlet*'s three-step analysis as a separate criterion under §85-2-311(1)(a), MCA. DNRC's proposed amendment, codified by the Legislature, replaced the judicially vulnerable term "unappropriated water" with the "legally available," while preserving DNRC's longstanding permit analysis. *SB97 Subcommittee Hearing, H. Nat. Resources*, 55th Leg., Ex. 1[3] and

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[1] DNRC Appendix 9 (Exhibit 9 references SB108. However, McIntyre submitted it in support of SB97 upon request by Rep. Beaudry. *SB97 Hearing*, Audio 2 of 3 @1:19:50-1:20:22; *Appellees' Appendix* 6.).

[2] Don McIntyre testimony explaining permit process, legal availability analysis, and *DNRC* Pamphlet; Appendix 11(1)-(3) Audio files.

[3] DNRC Appendix 10; Appendix 11(4) Audio files.

Don McIntyre Test. Audio @3:36-6:45, 8:26-9:10, 10:10-11:15[4] (March 12, 1997); *Executive Action Hearing SB97, H. Nat. Resources*, 55th Leg., Kathleen Williams Audio @5:15-6:55 (March 21, 1997); *Compare* SB0097.02 to SB0097.03[5].

The *DNRC Pamphlet*'s process codified by SB97 confirms that DNRC's three-step analysis equated the term "legal demands" to "water rights." *DNRC Pamphlet* 11-15; *DNRC Br.* 41-42. Step two - "Existing Filed Water Rights" - provides that "existing legal demands on the source" are determined by preparing a list of all potentially impacted *water rights*. *DNRC Pamphlet* 14. Step three - "Analysis of Water Availability & Filed Water Rights" - requires the comparison of physical water supply to the list of *water rights* on an affected source. *DNRC Pamphlet* 15; *SB97 Hearing,* Don McIntyre Test. Audio 2 of 3 @21:47-24:13, 27:57-28:58. The legislative history demonstrates that those with an interest at stake supported and understood that SB97 adopted DNRC's interpretation of legal availability and legal demands. E.g *Hearing SB97*, Holly Franz Test. Audio 1 of 3 @1:30:53-1:31:42 and Audio 2 of 3 @2:50-4:33, 38:20-39:15[6], Jon Bloomquist Test. Audio 2 of 3 @4:45-8:23, 9:20-9:45, 33:20-35:50, 37:50-38:18[7].

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[4] Explaining DNRC's proposed amendments, permit process, legal availability analysis, and *DNRC Pamphlet.*

[5] *Appellees' Appendix* 3 and 4.

[6] Water law attorney Holly Franz testimony on behalf of Montana Power regarding legal availability and unappropriated water analysis in the context of senior water right protection.

[7] Water law attorney Jon Bloomquist testimony on behalf of MT Stock Growers regarding legal availability and unappropriated water analysis in the context of senior water right protection.

Don McIntyre explained that DNRC's amendments did not alter the original intent or substance of the bill. *Subcommittee Hearing SB97,* Audio @8:28-9:00; *Executive Action Hearing SB97,* Audio @10:45-11:54. Rep. Harper acknowledged that DNRC's amendments made SB97 a better bill. The degree of change he referenced addressed the debate over the meaning of the term "reasonably" in the amendment do not support Appellees' claim the legislature rejected DNRC's interpretation. *Executive Action Hearing SB97,* Audio @41:29-43:21.

Nothing in the legislative history supports Appellees' contention that "legal demands" include nondegradation protections. It is completely implausible that the legislature silently added a requirement that all applicants prove nondegradation through the adoption of the term "legal demands" despite the fact it declined to impose such a requirement pursuant to SB280 only four years prior. *DNRC Br.* 36-39; See *Smith v. BNSF*, 2008 MT 225, ¶23, 344 Mont. 278, 187 P.3d 639 (Congress does not intend *sub silentio* to enact statutory language that it has earlier rejected); §1-2-106, MCA.

SB97's legislative history provides overwhelming support for DNRC's contention that the legislature adopted the meaning assigned by DNRC to "legal demands" through enactment of SB97. *Grenz*, ¶41.

B. Degradation protections are not quantifiable as "legal demands."

Appellees' contention that degradation protection is easily converted to a quantified flow for purposes of identifying existing "legal demands" falls flat. *Appellees' Br.* 27-31. An ORW classification is not a water right and the nondegradation protections do not quantify a protected flow. *DNRC Br.* 19-21.

Appellees are acutely aware that degradation protections cannot be quantified as a protected flow by simply deducting 15% from the base flow, or 10% from the low flow pursuant to 17.30.715(1)(a), ARM. In *Save Our Cabinets v. USDA*, the United States District Court rejected their contention that depletions exceeding 10% of the baseflow constituted degradation of an ORW classified source. It explained that WQA degradation means lowering:

> the quality of high-quality waters in terms of physical, biological or chemical properties of the water, unless the change is nonsignificant. §75–5–103(7), (27). Alteration of stream flows by less than 10 percent (based on a seven-day, ten-year low flow) is generally not considered "significant," unless the Montana DEQ determines otherwise. Admin. R. Mont. 17.30.715(1)(a), (2). Additionally, the Montana DEQ can make a nonsignificant finding based on information submitted by the applicant. Admin. R. Mont. 17.30.715(3).

254 F. Supp. 3d 1241, 1252 (D. Mont. 2017). It therefore concluded:

> the fact modeled results exceed the percentage threshold for determining nonsignificance does not categorically equate to a violation of the Montana's nondegradation standard. Montana DEQ can determine baseflow reductions in excess of ten percent are nonsignificant for other reasons. *See* Admin. R. Mont. 17.30.715(3).

Id. at 1253.

The same is true here. Even assuming arguendo that "legal demands" include something beyond water rights, DEQ may determine an activity that exceeds the depletion threshold is nonsignificant, or an activity that qualifies as nonsignificant must nonetheless be reviewed for degradation. 17.30.715(2) and (3), ARM. Ultimately, DEQ is delegated with the discretion to determine whether an activity is nonsignificant activity or causes degradation. *Save Our Cabinets*, at 1252-53; *CFC v. DEQ*, 2008 MT 407, ¶¶27 and 34-39, 347 Mont. 197, 197 P.3d 482(this Court defers to DEQ's interpretations of its own regulations). The rule upon which Appellees' argument is premised does not prohibit activities that reduce baseflows by more than 10%; does not protect 90% of ORW flows from appropriation; and, does not quantify flows protected from degradation as a legal demand. *Appellees' Br.* 21, 29.

Appellees ask the Court to ignore the fact that the WQA's degradation protections apply equally to all high-quality waters because that issue was addressed by the district court. *Appellees' Br.* 30. To the contrary, the district court's failure to consider the effects of rewriting the MWUA to include nondegradation as a legal demand is precisely the issue before this Court.

Appellees' assertion that treating degradation protections for high-quality waters as a legal demand under the MWUA imposes no novel burden on DNRC and may be necessary to implement the nondegradation provisions of the WQA

ignores the law as written. *Appellees' Br.* 31. BER and DEQ's responsibility for nondegradation protections under the WQA cannot be transferred to DNRC by judicial fiat. §§75-5-210, -211, -301, -303, -315, -316, MCA.

Moreover, the manner in which Appellees' quantify degradation protections means that as of 1997, 85% or 90% of all high-quality surface water flows in Montana were subject to existing "legal demands" pursuant to 17.30.715(1)(a), ARM, leaving only 10% to 15% for future appropriation. This result contradicts the Legislature's objective to ensure new water rights could be permitted through enactment of SB97 and must be rejected. *Supra* I(A); *DNRC Br.* 26-36.

C. ORW protections do not resemble Indian reserved water rights or other water rights.

Appellees' comparison of ORW protections in the WQA to Indian reserved water rights offends the nearly inviolate status of Indian reserved water rights. *Appellees' Br.* 17-18; *Winters v. United States*, 207 U.S. 564, 575-77 (1908). Indeed, the scope of Montana's statewide adjudication is driven in large part by the need to quantify federal and Indian reserved water rights in compliance with the McCarran Amendment. *Greely v. CSKT,* 219 Mont. 76, 89-100, 712 P.2d 754, 762-69 (1985). Montana, the United States, and the respective Tribes negotiated compacts through a decades-long process to quantify Indian reserved water rights. Similarly, the United States and Montana entered compacts to quantify other federally reserved water rights throughout Montana. See Title 85, Chpt. 20, MCA.

No state or federally reserved water right exists for ORW sources in the Cabinet Mountain Wilderness Area.

Compacted federal and Indian reserved water rights are real property rights that include priority dates, flow rates and/or volumes, places of use, purposes of use, and periods of use. These are key elements necessary to quantify the "legal demands" of such water rights. In contrast, an ORW classification is not a property right and is not defined by a priority date, flow rate, or period of use. It cannot be quantified in the same manner as instream flow water rights owned by tribes, the United States, Montana agencies, or others. *Supra* I(B); *DNRC Br*. 20-22. This Court should summarily reject Appellees' attempt to equate ORW protections to Indian reserved and other *in situ* water rights.

D. DNRC's interpretation is consistent with plain language and legislative intent of §85-2-311(1)(a) and -311(1)(b), MCA.

Appellees maintain that the more specific reference to "water rights" in the adverse effect criterion means "legal demands" must mean something other than water rights. Specifically, Appellees argue that DNRC's interpretation renders the legal availability analysis superfluous because the adverse effect analysis already expressly addresses the impact of a new permit on senior water rights. *Appellees' Br*. 18-19, 22-23; *Order on PJR* 8. Appellees' rationale leads to the absurd result that DNRC may not consider water rights as "legal demands" at all pursuant to §85-2-311(1)(a), MCA, because the potential impact to senior water rights is

already accounted for by the more specific language in §85-2-311(1)(b), MCA. *City of Missoula v. Fox*, 2019 MT 250, ¶18, 397 Mont. 380, 450 P.3d 898 (statutory interpretation should not lead to absurd results where a reasonable interpretation will avoid it).

Like current statute, from 1983 through 1997, the "unappropriated waters" criterion did not reference water rights, whereas the adverse effect criterion expressly referenced "water rights of prior appropriators." *Compare* §85-2-311(1)(a) and (b), MCA (1983), to §85-2-311(1)(a) and (b), MCA (2019). Nonetheless, DNRC only considered water rights to determine whether "unappropriated water" was available for a new permit. *Supra* I(A); *DNRC Pamphlet* 11-15; *DNRC Br.* 27-30, 41-42.

DNRC's explanation in the *Final Order* and before this Court is the same explanation it provided to the Legislature in 1997. The legal availability analysis determines *water availability* for the new use based on the aggregate legal demand of all senior *water rights* on a potentially impacted source. The adverse effect analysis determines *potential injury* to individual senior *water rights* based on an applicant's plan and necessary conditions to ensure those water rights will be satisfied in times of shortage. *DNRC Pamphlet* 11–15; *Subcommittee Hearing*

SB97, McIntyre Test. Audio @12:50-15:28[8]; *DNRC Br.* 24-26; AR_0010-0012.

The Legislature was aware that DNRC interpreted "legal demands" to be "water rights" despite the adjacent and more specific reference to water rights contained in §85-2-311(1)(b), MCA. It was aware of the distinction drawn by DNRC between the legal availability and adverse effect criteria. Fully aware of DNRC's interpretation, the Legislature declined to define "legal demands" or otherwise act to inform DNRC's interpretation. Enactment of SB97 reflects the Legislature's intent to codify DNRC's interpretation as its own and creates a presumption that DNRC properly interpreted the law. *Grenz*, ¶¶41-42(Legislature presumed adopt agency's previous construction of similar statutes or related rules when it amends a statute); *Lohmeier*, ¶28. DNRC's interpretation of the distinct, yet interdependent, provisions of §§85-2-311(1)(a) and -311(1)(b), MCA, best effectuates the MWUA's paramount objective to protect senior water rights from encroachment by new uses. *Baitis*, ¶¶22-24 (agency interpretation should be upheld where it is reasonable and best effectuates the purpose of the statute); §§1-2-101 and 102, MCA.

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[8] Explanation that legal availability evaluates likelihood water available for new use as opposed to plan to prevent adverse effect.

E. DNRC's interpretation gives effect to the MWUA's policy statements.

The general provisions of the MWUA regarding conservation[9] and degradation cited by Appellees do not justify ignoring the more specific provisions related to water quality. *Appellees' Br.* 24-25.

For example, a basin may be closed to address water quality or water classification concerns, but only in response to a petition by DEQ. §85-2-319(2)(d), MCA. Qualified entities such as DEQ may protect water quality and aquatic ecosystems through obtaining an instream flow water reservation. §85-2-316, MCA[10]. A controlled groundwater area may be implemented to address water quality issues, but only when relevant water quality standards, the ability of water users to exercise their rights, or public health and safety will otherwise be impaired. §85-2-506(5), MCA. Water permits and reservations are subject to public interest considerations under specific circumstances. §§85-2-311(3)-(4), -316(4), and -402(4), (6), MCA. These specific provisions of the MWUA reflect the Legislature's intent that DNRC only consider issues related to water quality in limited circumstances. *DNRC Br.* 22–23 and 38-39; *Oster v. Valley County,* 2006 MT 180, ¶17, 333 Mont. 76, 140 P3d 1079.

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[9] Both the district court and Appellees erroneously cite §85-1-101(5), MCA, which relates to the development of state water projects, not permitting new appropriations.

[10] §85-2-316(6), MCA, limits a water reservation for instream flow to protect water quality to 50% of the average annual flow. Appellees promote protection of between 85% and 90% of flow from degradation on all high-quality water sources without a water right.

Likewise, the MWUA limits when an applicant is required address WQA issues before obtaining a permit. *DNRC Br.* 36-39. An applicant is only required to address adverse effect to a prior appropriator's water quality, or the ability of a discharge permit holder to satisfy effluent limitations if a valid objection is filed. §§85-2-311(1)(f),(h) and -311(2), MCA.

An applicant is only required to demonstrate a proposed appropriation is in substantial accordance with WQA classifications if DEQ or a water quality district files a valid objection. §85-2-311(1)(g) and -311(2), MCA. This requirement is similar to the above cited provisions of the MWUA that require a qualified entity to present water quality issues considered under the MWUA.

All of the water quality issues for which an objection may be filed pursuant to §85-2-311(1)(f-h), MCA, are "quantitative" in the sense that the alleged impact is the result of a reduction in flows by an applicant's proposed diversion of withdrawal of water. Nonetheless, the are not "legal demands." Treatment as such renders §85-2-311(2), MCA, meaningless.

DNRC may not simply disregard legislative directives and require an applicant address the WQA's degradation protections as "legal demands." DNRC's interpretation gives effect to the specific provisions of the MWUA regarding protection of water quality and public interests.

II. APPELLEES' CONSTITUTIONAL CHALLENGE MUST BE REJECTED.

In the alternative, Appellees argue issuance of the provisional permit exempts RC Resources' activities from degradation review pursuant to §75-5-317(2)(s), MCA. Therefore, DNRC's interpretation that only DEQ or a water quality district may raise a water classification objection pursuant to §85-2-311(1)(g) and -311(2), MCA, violates Appellees' constitutional right to a clean and healthful environment. *Appellees' Br.* 2, 6, 31, 47, 48, 54, and 57. As explained below, Appellees' constitutional challenge fails because: (A) the permit issued by DNRC does not authorize degradation; B) the harm complained of is speculative and not ripe; and, C) remedies available pursuant to the WQA adequately protect Appellees' constitutional interests from harm.

A. The permit does not authorize degradation

Appellees maintain that ***DEQ*** is an inadequate representative for its constitutional interests because nothing requires ***DEQ*** to demonstrate considered judgment as to why it did not object to RC Resources' permit application. Therefore, there is no ***DEQ decision***:

> to reflect any considered judgment by that agency as to whether a water-classification objection was warranted, and therefore no opportunity for this Court to ascertain whether ***DEQ*** elected to forego action that might have shielded CFC's constitutional interests from harm for a non-arbitrary and otherwise lawful reason.

Appellees Br. 54 (emphasis added)[11].

This argument reflects that DEQ, not DNRC, is responsible for regulating RC Resources' activities in compliance with the WQA nondegradation policy, the Hardrock Mining Act, the Montana Environmental Policy Act, and the Montana Constitution. *MEIC v. DEQ*, 1999 MT 248, ¶5, 296 Mont. 207, 988 P.2d 1236; *MEIC*, 2019 MT 213, ¶¶29-31; §§75-5-101, -201, -211, and -301 et seq, MCA. The nondegradation policy administered by DEQ provides for criteria, procedures, public review, and appeal of DEQ decisions related to water quality and degradation. 17.30.701, ARM.

DNRC does not dispute that ORW sources "must be afforded the greatest protection feasible *under state law* ..." §75-5-315(1), MCA. However, the protections for ORW classified sources are not absolute and are not enforced by DNRC. The WQA and rules adopted by BER provide the "state law" that defines the extent of those protections. The WQA provides that "diversions or withdrawals of water established and recognized under Title 85, chapter 2" are nonsignificant because of their low potential for harm to human health or the environment. §75-5-317(1), (2)(s), MCA. The WQA also charges the BER and

[11] While there is no record of DEQ's decision, presumably DEQ gave some explanation to Appellees: "the [Appellees] met with DEQ concerning this issue and it appears that DEQ may not exercise its statutory right to object under MCA §85-2-31l(l)(g)." AR_0602.

DEQ with the authority and responsibility to adopt enforce degradation and ORW protections. §75-5-303(7), -316, MCA (BER and DEQ may not authorize degradation of ORW sources).

DNRC takes no position regarding whether RC's activities are nonsignificant or degrade any ORW sources because DNRC lacks the authority and expertise to make that determination. *Appellees' Br.* 45. That said, Appellees appear to inflate potential depletions when compared to the stated limitations of RC Resources' model and the depletion analysis conducted by DNRC. *Compare Appellees' Br.* 6 *to* AR_0141-0143 and AR_0543-0563.

RC Resources must remove groundwater from the mine adit in order to develop its mine. Removal of that groundwater will deplete surface water regardless of whether DNRC authorizes beneficial use of that water. AR_0135. RC Resources stipulated that the provisional permit is subject to compliance with the extensive environmental review being conducted by the United States Forest Service and DEQ. AR_0705-0708. The Record of Decision and FSEIS issued by the USFS are contingent upon DEQ's determination regarding compliance with the WQA, including a determination whether changes in flow are nonsignificant or cause degradation. *Final Supplemental EIS for the Rock Creek Project*, Vol.I,

Chpt. 4-107 (USFS March 2018) [12]; *Record of Decision Rock Creek Project*, §1.5.1.5, 32-34 (USFS August 2018)[13].

Any harm that *could* occur is not the result of DNRC's approval of the beneficial water use permit or application of §85-2-311(1)(g) and -311(2), MCA. DNRC is not authorized to make a degradation determination and may not prevent RC Resources from degrading ORW classified sources. Therefore, its action is not the legal cause of the alleged environmental injury. See *Bitterrooters for Planning v. DEQ*, 2017 MT 222, ¶¶33-35, 388 Mont. 453, 401 P.3d 712 (an agency action is a legal cause of an environmental effect only if the agency can prevent the effect through the lawful exercise of its independent authority). As in *Northern Plains Resource Council v. Montana Board of Land Commissioners*, RC Resources must still comply with all aspects of DEQ's review pursuant to the Hardrock Mining Act, the MEPA, and applicable WQA statutes and regulations. 2012 MT 234, ¶¶18-19, 366 Mont. 399, 288 P.3d 169. Appellees fail to demonstrate that the environmental review conducted by DEQ provides inadequate protections and remedies for any harm. *Infra* II(C).

Finally, Appellees' argument reflects that a discretionary objection pursuant to §85-2-311(2), MCA, was not intended to be the means of protecting ORW

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[12] https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd573773.pdf

[13] https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd593749.pdf

sources. DEQ must decide whether RC Resources mining activity is nonsignificant, or subject to degradation review, because those mining activities must be authorized by DEQ. 17.30.706(2), ARM. Any decision made by DEQ regarding laws it administers is subject to procedures, public review, and appeal. Accordingly, DEQ's discretion to file an objection under the MWUA is rationally based and does not violate the Montana Constitution because the WQA still obligates DEQ to administer nondegradation protections consistent with the law.

B. Appellees' constitutional challenge is not ripe.

Appellees' constitutional argument is not ripe because it is predicated upon speculation that DEQ will determine RC Resources' activities are nonsignificant pursuant to §75-5-317(2)(s), MCA.

DEQ is required to make a threshold determination whether impacts from RC Resources' mining activities are nonsignificant or subject to further degradation review because they are subject to DEQ permitting and approval. 17.24.116, 17.24.168 and 17.30.706(2), ARM. DEQ could determine §75-5-317(2)(s), MCA, does not apply to the *groundwater* permit because it does not authorize diversion of water from the ORW classified *surface water* sources, because water must be withdrawn from the mine adit as part of RC Resources' operating permit regardless of whether a beneficial water use permit is issued, or for any other reason DEQ finds applicable based upon its experience and expertise.

If DEQ determines that RC Resources' activities are nonsignificant for any reason the WQA provides administrative and judicial remedies. *Infra* II(C)

Similar to *Montana Power Co. v. Montana Public Service Commission*, DNRC's issuance of RC Resources' provisional permit does not impair Appellees' constitutional interests. 2001 MT 102, ¶¶32, 36-38, 305 Mont. 260, 26 P.3d 91. The injury Appellees complain of only occurs *if* DEQ determines §75-5-317(2)(s), MCA, exempts RC Resources' activities from degradation review. This speculative constitutional claim is not ripe for review to nip a potential injury in the bud, even if the Court determined it is very likely to occur. *Id*.

Even though issuance of the provisional permit *could* change the status quo waiting until DEQ determines the applicability of §75-5-317(2)(s), MCA, will not cause irremediable adverse consequences. *Qwest v. Department of Public Service Regulation*, 2007 MT 350, ¶¶19-24, 31-32, 340 Mont. 309, 174 P.3d 496. Conversely, addressing Appellees' constitutional arguments now inappropriately interferes with DEQ's application of the law to RC Resources' regulated activities. *Id.*, ¶24. Finally, there is no factual based upon which this Court could evaluate whether DEQ's application of §75-5-317(2)(s), MCA, impairs Appellees' constitutional interests. *Id.*, ¶25; *Appellees' Br.* 54.

For these reasons Appellees' constitutional challenge is not ripe for review.

C. Adequate remedies exist to protect Appellees' constitutional interests.

Finally, Appellees' constitutional challenge should be rejected because the remedies available pursuant to the WQA adequately protect their interests.

The Montana Constitution does not guarantee a specific remedy to protect the right to a clean and healthful environment. Mont. Const., Art II, §3; *See Meech v. Hillhaven West, Inc.*, 238 Mont. 21, 34–35, 776 P.2d 488, 496 (1989). Instead, it requires the Legislature to provide for administration, enforcement, and adequate remedies to implement the right to a clean and healthful environment. Mont. Const., Art. IX, §1. The Legislature provided those protections and remedies pursuant to the provisions of the WQA, not the MWUA. §§75-5-102, -301 et seq., MCA.

The WQA's nondegradation provisions are generally recognized as the reasonable legislative implementation of the mandate provided for in Mont. Const., Art. II, §3 and Art. IX, §1. *MEIC*, 1999 MT 248, ¶80. If DEQ determines that RC Resources' activities are nonsignificant pursuant to §75-5-317(2)(s), MCA, the WQA provides adequate remedies to challenge that determination. §75-5-102, MCA (WQA provides adequate remedies to prevent degradation); §75-5-303(5), MCA(provides MAPA review of a DEQ nondegradation determination); *MEIC*, 1999 MT 248, ¶17 (plaintiffs brought declaratory judgment and mandamus action to challenge an exemption contained in §75-5-317, MCA, as unconstitutional);

MEIC, 2019 MT 213, ¶19(recognizes judiciary's inherent authority to conduct non-MAPA judicial review of DEQ determinations). Indeed, some of the Appellees availed themselves of these remedies to challenge previous degradation determination made by DEQ for the Rock Creek Mine. *CFC v. DEQ*, ¶¶5-18.

The remedies enacted by the legislature are presumed constitutional. *Myers v. Yellowstone County*, 2002 MT 201, ¶21, 311 Mont. 194, 53 P.3d 1268. In *Sunburst School Dist. v. Texaco, Inc.*, this Court declined to decide whether a constitutional tort existed for violation of the right to a clean and healthful environment because other remedies adequately addressed the harm complained of by the plaintiffs. 2007 MT 183, ¶¶61-64, 338 Mont. 259, 165 P.3d 1079. For similar reasons this Court should refrain from addressing Appellees' constitutional argument regarding §85-2-311(2), MCA, because the WQA is presumed to provide adequate remedies for any future harm to Appellees' interests. *Appellees' Br.* 54.

CONCLUSION

The *Final Order* correctly concluded that regulations regarding nondegradation of ORW classified sources do not constitute "existing legal demands" pursuant to the legal availability criteria. Determination that Appellees are not eligible to file a valid objection pursuant to §85-2-311(1)(g) and -311(2), MCA, did not violate their right to a clean and healthful environment. The DNRC respectfully requests this Court to reverse the district court's *Order on PJR* and

affirm the DNRC's *Final Order* for the reasons set forth in the DNRC's Opening Brief and this Reply Brief.

RESPECTFULLY SUBMITTED this 30th day of March, 2020.

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CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rule of Appellate Procedure 11(4)(d), I certify that *APPELLEE MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION'S ANSWER BRIEF* is printed with proportionately spaced Times New Roman text typeface of 14 points; is double spaced (except for footnotes and quotes); and the word count, calculated by Microsoft Word 2016, is 4, 999 words, excluding this Certificate of Compliance, the Table of Contents, and the Table of Authorities.

RESPECTFULLY SUBMITTED this 30th day of March, 2020.

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